Supreme Court of the United States.

OCTOBER TERM, 1900.

No. 159.

CHARLES T. BARNEY,

Appellant,

against

THE CITY OF NEW YORK, BOARD OF RAPID TRANSIT RAILROAD COMMISSIONERS FOR THE CITY OF NEW YORK, SETH LOW, EDWARD M. GROUT, MORRIS K. JESUP, ALEXANDER E. ORR, JOHN H. STARIN, WOODBURY LANGDON, CHARLES S. SMITH and JOHN CLAFLIN, as Commissioners of Rapid Transit; JOHN B. McDONALD and MAY L. SHALER, as Administratrix of the Estate of Ira A. Shaler, deceased,

Appellees.

APPEAL FROM THE CIRCUIT COURT OF THE UNITED STATES FOR THE SOUTHERN DISTRICT OF NEW YORK.

BRIEF ON BEHALF OF APPELLANT.

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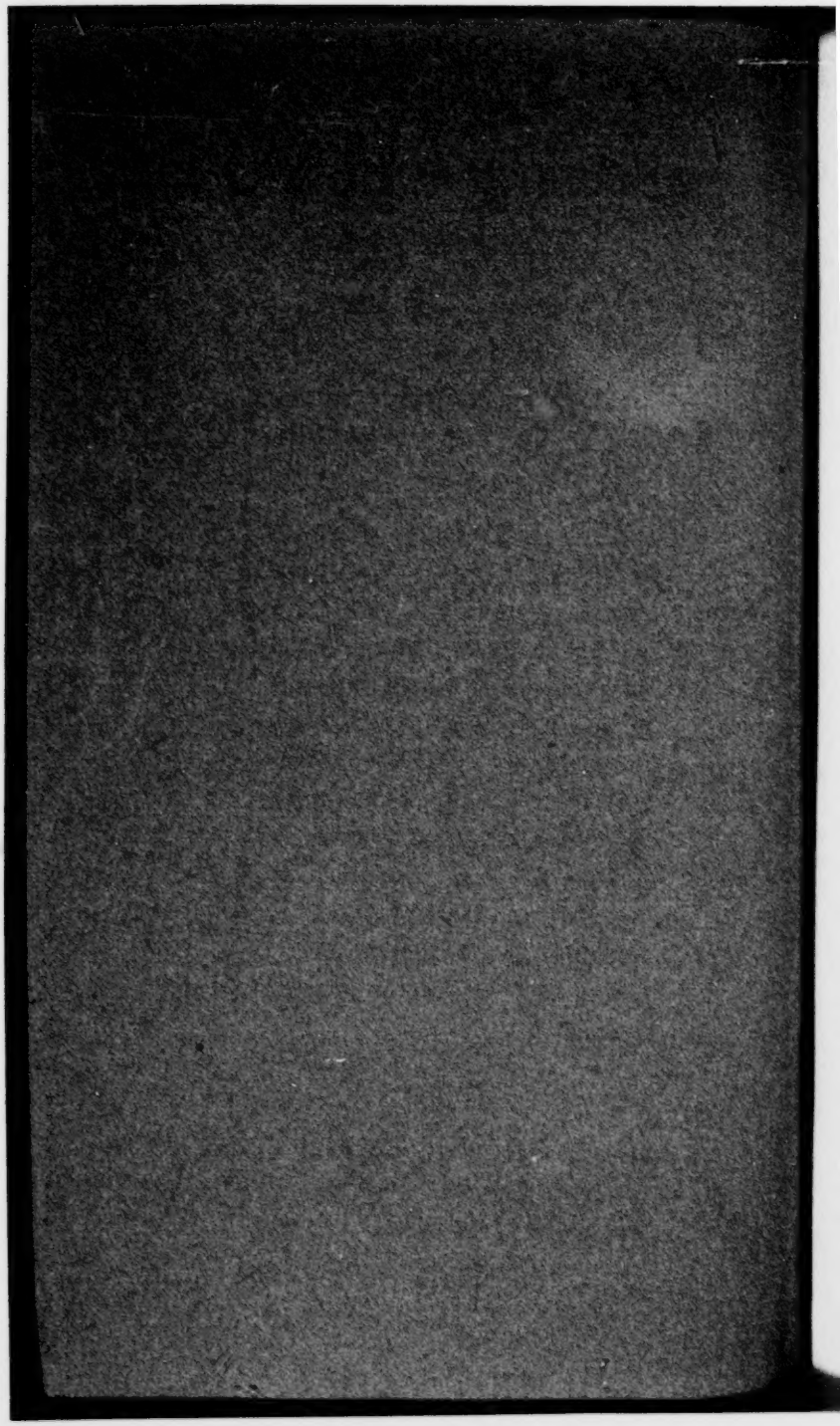

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Statement.

By the first section of the Rapid Transit Act passed by the Legislature of the State of New York in 1891 (Chap. 4 of the Laws of New York of 1891) the appellees, Seth Low, Edward M. Grout, Morris K. Jesup, Alexander E. Orr, John H. Starin, Woodbury Langdon, Charles S. Smith and John Claflin, were designated and appointed Commissioners of Rapid Transit and were given power and authority, and the duty was imposed upon them by said act to determine and establish the route and general plan of a subway in the City of New York, and to build and construct the same. The provisions of this section are as follows:

> "SEC. 1. In each city having over one million of inhabitants, according to the last preceding national or state census, there shall be a board of rapid transit railroad commissioners in and for such city, which shall consist of the mayor of such city, the comptroller or other chief financial officer of such city, the president of the chamber of commerce of the state of New York, by virtue of his office, and the following named persons, to wit: William Steinway, Seth

> Low, John Claflin, Alexander E. Orr and John H. Starin. The members of said board shall be styled commissioners of rapid transit. * * * * The board thus constituted shall have and exercise the specific authority and powers hereinafter conferred and also such other and necessary powers as may be requisite to the efficient performance of the duties imposed upon said board by this act."

It is to be noted that the Board of Rapid Transit by the last sentence of the section above quoted is given broad discretionary powers to do whatever may be requisite to the efficient performance of the duties imposed upon it by the act.

Section 4 of the Transit Act authorizes the Board to determine the route and general plan of construction of any rapid transit railway that it may deem necessary for the interests of the public, and requires that,

> " such general plan shall show the general mode of operation and contain such details as to manner of construction as may be necessary to show the extent to which any street, avenue or other public place is to be encroached upon and the property abutting thereon affected."

By section 18 of Article 3 of the Constitution of the State of New York, it is provided as follows:

> "No law shall authorize the construction or operation of a street railroad except upon the condition that the consent of the owners of one-half in value of the property bounded on, and the consent also of the local authorities having the control of, that portion of a street or highway upon which it is proposed to construct or operate such railroad be first obtained, or in case the consent of such property owners cannot be obtained, the Appellate Division of the Supreme Court, in the department in which it is proposed to be constructed may, upon application, appoint three commissioners who shall determine, after a hearing of all parties interested, whether, such railroad ought to be constructed or operated, and their determination, confirmed by the court, may be taken in lieu of the consent of the property owners."

In accordance with these constitutional requirements the Rapid Transit Act (Section 5) further provides that after any determination by the said Board of any route or routes and of any general

plan of construction of said railway, the said Board shall obtain the consent of the city and of the local authorities having exclusive control of any street which is to be used or occupied by said railroad.

"Upon obtaining the approval and consent of the local authorities, as above provided, the said Board of Rapid Transit Railroad Commissioners shall also, unless such approval and consent of local authorities shall have been refused, take the necessary steps to obtain, if possible, the said consents of the property owners along the line of the said route or routes. * * *

"If such consents of property owners cannot be obtained, the said Board may in its own name, make application to the General Term of the Supreme Court in the Judicial District in which such railway is to be constructed, for the appointment of three Commissioners to determine and report after due hearing whether such railway ought to be constructed and operated. * * * The said Commissioners shall determine after public hearing of all parties interested whether such railroad ought to be constructed and operated, and shall report the evidence taken to said General Term, together with

a report of their determination whether such road ought to be constructed and operated, which report, if in favor of the construction and operation of such road, shall, when confirmed by said Court, be taken in lieu of the consent of the property owners above mentioned."

Section 6 further provides as follows:

"When the consents of the local authorities and the property owners, or, in lieu thereof, the authorization of the said General Term of the Supreme Court upon the report of Commissioners, shall have been obtained, the Board of Rapid Transit Railroad Commissioners shall at once proceed to prepare detailed plans and specifications for the construction of such rapid transit railway or railways *in accordance with the general plan of construction*, including all devices and appurtenances deemed by it necessary to secure the greatest efficiency, public convenience and safety, including the number, location and description of stations and plans and specifications for suitable supports, turnouts, switches, sidings, *connections*, landing places, buildings, platforms, stairways, elevators, telegraph and signal devices, and other suitable appliances

> incidental and requisite to what the said Board may approve as the best and most efficient system of rapid transit in view of the public needs and requirements. * * * The Board may, from time to time, alter such detailed plans and specifications, *but always so that the same shall accord with the general plan of construction.*"

In pursuance of the powers conferred upon them by the Rapid Transit Act the Commissioners aforesaid determined upon a plan of construction of a subway in the City of New York to which the appellant gave his written consent (Record, p. 27). The Commissioners of Rapid Transit were however unable to obtain the consent of the owners of one-half in value of the property on Park Avenue as required by the provision of the Constitution of the State of New York above referred to, and as also required by the provisions of the Rapid Transit Act, and in lieu thereof under the provisions of said act they submitted a plan of construction to the authorities of the City of New York and to the Appellate Division of the Supreme Court of the State of New York for the First Department, by which it was provided that the portion of the subway through Park

Avenue between 34th and 42d Streets, should be built in such a manner that the exterior surface of the easterly wall of said tunnel should be 37 feet and six inches from the building line of the houses on the east side of Park Avenue (Record, pp. 6, 24). This plan of construction was approved by the Court and the city authorities, and vas the plan to which the appellant had given his written consent (Record, pp. 8, 9, 27).

In March, 1902, the foundations of many of the houses on the east side of Park Avenue, between 37th and 38th Streets, gave way and the houses began to slide into the subway. It was then learned for the first time that the tunnel as being constructed was unauthorized and was not being built in accordance with the general plan of construction approved by the Appellate Division as aforesaid, and consented to by the appellant, and that the easterly wall of said tunnel instead of being 37 feet and 6 inches from the building line of the houses on the east side of Park Avenue was within 7 feet thereof (Record, pp. 9, 25).

The appellant is the owner of the house No. 101 East 38th Street, being on the northeast corner of Park Avenue and 38th Street (Record,

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pp. 4, 27). Upon ascertaining the cause of the destruction of the houses on the adjoining block the appellant brought this suit in the Circuit Court of the United States for the Southern District of New York, and applied for an injunction to prevent a further construction of the subway in the unauthorized route, to compel a filling in of the tunnel as improperly constructed and to recover the damages sustained by him (Record, p. 39). The jurisdiction of the Court below was claimed by the appellant upon the ground that the defendants composing the Board of Rapid Transit had been specifically appointed by and named in the Rapid Transit Act and had been thereby clothed by the Legislature of the State of New York with the power and duty of constructing the subway; that, therefore, whatever they did to carry out and perform the duty imposed upon them by the State was the act of the State and that his house and the easements in his property adjoining the tunnel were being taken from him by reason of the illegal construction of the tunnel by them without just compensation, and therefore in violation of the Fourteenth Amendment of the Constitution of the United States, which provides that a State cannot deprive a person of his property without due process of law.

The Court below found the tunnel as constructed to be illegal and without authority of law, but denied the application for an injunction and dismissed the cause for want of jurisdiction upon the ground that the unauthorized construction of the tunnel by the Rapid Transit Commissioners was not an act of the State of New York, but was the act of the appellees in their character of private individuals and as trespassers. In other words, the Court held that the acts of the Commissioners in building the tunnel in an authorized manner and in accordance with the plan approved by the Appellate Division were the acts of the State of New York, but that the moment they constructed the tunnel in an unauthorized and improper manner, they then ceased to be clothed with the power and authority of the State, assumed their characters as individuals and became trespassers. In the opinion of the Court (Record, p. 67), it was said as follows, at p. 71:

> "Now, in the case at bar, the first question to be considered is whether the state, through its legislature, has given or undertaken to give authority to the rapid transit commissioners to construct this eastern tunnel

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which is the thing complained of. If the legislature had merely selected the streets and avenues, and left it to the commissioners to determine whereabouts therein the tunnel should be located, the action of the commissioners would be the action of the state. But it did no such thing. It carefully provided for notice and hearing and consents, for the various steps which make up what is understood to be 'due process of law,' all to be carried on to a conclusion which should determine upon a route and general plan sufficiently detailed to show the 'extent to which any avenue is to be encroached upon and the property abutting thereon affected.' Upon such route only, and under such plan only, is any authority to construct conferred by the state on the defendants or any of them. *When they depart from such plan, whatever trespass they may commit upon private rights is one which the state has not only not authorized them to commit, but under any fair interpretation of the rapid transit act has forbidden them to commit.*

"If this Court were persuaded to assent to the contention of defendants that this easterly tunnel is within the description in the approved route and general plan, as a mere 'connection' or 'siding' or what not,

then it would take jurisdiction, because the action of commissioners, engineer, and contractors being in conformity to the general plan, which the legislature had provided for and sanctioned, would be actions by persons acting under State authority, and thus constituted agents of the State to contravene the provisions of the constitutional amendment."

From the final decree dismissing the bill upon the ground that the suit did not involve a dispute or controversy properly within the jurisdiction of the Court (Record, p. 74), this appeal has been taken under the provisions of Section 5 of the Circuit Court of Appeals Act (26 U. S. Stat., 826) upon the question of jurisdiction alone, which has been certified to this Court as follows (Record, p. 42):

"Is this court without jurisdiction of this cause for the reason that the acts of the defendants in building and constructing the easterly portion of the tunnel in Park Avenue in the City of New York were not acts of the State of New York to which the prohibition of the Fourteenth Amendment of the Constitution of the United States, which provides that no state shall 'deprive any person of life, liberty or property without due process of law,' has application?"

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FIRST POINT.

The Court below had jurisdiction of the cause.

The single question presented upon this appeal is whether the act of the Board of Rapid Transit in building the subway in Park Avenue between 34th and 42d Streets in an unauthorized and illegal manner was the act of the State of New York.

If so, then the Court below should have retained jurisdiction of the cause. If not, then the decision of the lower Court was right.

By the Fourteenth Amendment to the Constitution of the United States, it is provided as follows:

> "Nor shall any State deprive any person of life, liberty or property without due process of law."

The prohibition of this amendment refers to action by a State, which obviously can act only through its officers or agents. It was conceded by the Court below that the Board of Rapid Transit having been appointed by an act of the Legislature was an agent of the State of New York and that if the plaintiff had been deprived of his property without due process of law by any

act of the Board of Rapid Transit done in pursuance of power specifically given it by the Rapid Transit Act, it should have retained jurisdiction of the cause. The only difficulty presenting itself to the Circuit Court and preventing it from taking jurisdiction of the case was that the act of the Board in building the tunnel as it did was so illegal and so unauthorized that in its opinion it must be deemed to be a trespass on the part of the individual members of the Board and not an act done by said Board in its capacity of agent of the State of New York and in pursuance of the power given it by the Rapid Transit Act.

The theory of the Court seemed to be that an agent of the State can only be considered such when it acts in conformity with the specific authority given to it by the Act of the Legislature creating it, and that if it does any act without express legislative authority, although purporting to act by reason of the power and right conferred upon it by the State, such act is not done in its character as agent and is not to be deemed the act of the State.

The question is important, and as an abstract proposition it would seem difficult to support the

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contention that a person appointed to do a particular thing by an act of the Legislature of the State, who does that particular thing because of the authority derived from the legislature, but not in the specific manner directed thereby, is therefore to be deemed to be acting in his individual capacity and as a trespasser. It is certainly difficult to forecast the result of such a doctrine, if a State can repudiate the action of its Governor or Treasurer, whenever it deems such action to have exceeded the authority given or intended to be given them.

We believe, however, that this question is no longer open for argument and that it has been decided by this Court that any act of an agent of a State, done pursuant to the powers derived by him from the Legislature and by virtue of his public position as such agent, whether specifically authorized by the statute appointing him or not, is an act of the State within the meaning of the Fourteenth Amendment of the Constitution.

In the case of *ex parte* Virginia, 100 U. S., 339, it appeared that a Judge of a County Court in Virginia, charged by the law of that State with the selection of jurors, excluded from the Jury list, made out by him as such officer, grand

jurors and petit jurors of African race and black color, on account of their race and color. He was indicted by the Federal Grand Jury for a violation of the act of Congress entitled "An Act to Protect all Citizens in their Civil and Legal Rights," which provided "that no citizen * * * shall be disqualified from service as grand or petit juror in any Court * * * of any State on account of race, color or previous condition of servitude, and any officer or other person charged with any duty in the selection or summoning of jurors who shall exclude or fail to summon any citizen for the cause aforesaid shall on conviction thereof be guilty of a misdemeanor." An application was made by the indicted Judge of the State Court to this Court for a writ of *habeas corpus*. The petition for the writ was denied, and this Court held that the federal statute referred to was authorized by the Fourteenth Amendment of the Constitution and that the act of the Judge was in effect the act of the State of Virginia denying to a "person within its jurisdiction the equal protection of the laws." At page 346 of the opinion it was said by Mr. Justice STRONG, as follows:

"We have said the prohibitions of the

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Fourteenth Amendment are addressed to the States. They are, 'No *State* shall make or enforce a law which shall abridge the privileges or immunities of citizens of the United States, * * * nor deny to any within its jurisdiction the equal protection of the law.' They have reference to the actions of the political body denominated a State, by whatever instruments or in whatever modes that action may be taken. A State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are exerted, shall deny to any person within its jurisdiction the equal protection of the laws. *Whoever, by virtue of public position under a State goverment, deprives another of property, life or liberty, without due process of law, or denies or takes away the equal protection of the laws, violates the constitutional inhibition; and as he acts in the name and for the State and is clothed with the State's power, his act is that of the State.* This must be so, or the constitutional prohibition has no meaning."

In the Virginia case the question was raised that the act of the Judge was not authorized by

the State Statute. As to this the Court said at page 348:

> "But if the selection of jurors should be considered in any case a judicial act, can the act charged against the petitioner be considered such when he acted *outside of his authority and in direct violation of the spirit of the State Statute?* That statute gave him no authority, when selecting jurors, from whom a panel might be drawn for a circuit court, to exclude all colored men merely because they were colored. Such an exclusion was not left within the limits of his discretion."

Assuming that the Board of Rapid Transit in the present case was given no authority by the Rapid Transit Act to construct the tunnel as it has done, it is not plain what distinction can be drawn between the Virginia case and the case at bar. In the former the Judge was not authorized by the State statute to exclude from the jury list jurors on account of their race and color. He however did so acting under the power given him by the State to select the jury lists and his act in so doing was held an act of the State. If, in the present case, the Board had no authority to build the tunnel as it did, yet it did so build it

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by virtue of its public position and under the general power given to it by the Legislature to build a tunnel in Park Avenue, in the City of New York, and it would seem to follow from the Virginia case that the Board in so constructing the tunnel acted as the agent of the State.

The case of Neal vs. Delaware, 103 U. S., 370, came before this Court upon a writ of error to the State Court of Delaware. The plaintiff in error having been indicted for rape under the laws of Delaware, of which he was a citizen, petitioned the State Court for a removal of the case to the Circuit Court of the United States, alleging that all colored persons were systematically excluded from serving as grand or petit jurors in the State Courts by reason of the action of the officers charged with making up the jury lists, and that petitioner was thus denied the equal civil rights guaranteed by the Fourteenth Amendment. The petition having been denied and the plaintiff compelled to go to trial, he therefore moved, upon the same grounds, to quash the indictment. The motion was denied and the plaintiff, having been convicted, sued out the writ of error.

This Court having first ruled that no such exclusion of the colored race was justified by

either the Constitution or the laws of the State, held that the case was not one embraced by the removal statute as construed in Virginia vs. Rives, *supra*. The majority opinion then proceeds as follows (pp. 394–397):

> "Although for the reasons we have given the prisoner was not entitled to a removal of this prosecution into the Circuit Court of the United States, he is not without remedy if the officers of the State charged with the duty of selecting jurors were guilty of the offense charged in his petition. A denial upon their part, of his right to a selection of grand and petit jurors without discrimination against his race, because of their race, would be a violation of the Constitution and laws of the United States, which the trial court was bound to redress. As said by us in *Virginia v. Rives*, *supra* 'the court will correct the wrong, will quash the indictment, or the panel; or, if not, the error will be corrected in a superior court,' and ultimately in this court upon review. * * * It was, we think, under all the circumstances, a violent presumption which the State court indulged, that such uniform exclusion of that race from juries, during a period of many years, was solely because, in the judg-

ment of those officers, fairly exercised, the black race in Delaware were utterly disqualified, by want of intelligence, experience, or moral integrity, to sit on juries. The action of those officers in the premises is to be deemed the act of the State; and the refusal of the State court to redress the wrong by them committed was a denial of a right secured to the prisoner by the Constitution and laws of the United States. Speaking by Mr. Justice STRONG, in *Ex-parte Virginia*, we said, and now repeat, that 'a State acts by its legislative, its executive, or its judicial authorities. It can act in no other way. The constitutional provision, therefore, must mean that no agency of the State, or of the officers or agents by whom its powers are executed, shall deny to any person within its jurisdiction the equal protection of the laws. Whoever, by virtue of public position under a State government, deprives another of property, life, or liberty without due process of law, * * * violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with the State's authority, his act is that of the State. This must be, or the constitutional prohibition has no meaning.'"

The judgment of the State Court was accord-

ingly set aside and the case remanded for further proceedings. Throughout the argument no stress is laid on the fact that discretion was vested in the State officials. Undoubtedly they were entitled to the exercise of a large discretion in the choice of individuals to be placed upon the jury lists, but this discretion did not extend to discrimination on account of race or color, and when they overstepped these limits, they became willful violators of the statute. Nevertheless, such action was deemed action by the State within the meaning of the Fourteenth Amendment.

The doctrine of *ex parte* Virginia, was substantially reaffirmed in the Civil Rights Cases, 109 U. S., 3, and it was there said of this case by Mr. Justice BRADLEY, as follows at p. 15:

> "In the Virginia case, the State, through its officer, enforced a rule of disqualification which the law was intended to abrogate and counteract. *Whether the statute book of the State actually laid down any such rule of disqualification or not, the State, through its officer, enforced such a rule;* and it is against such State action, through its officers and agents, that the last clause of the section is directed."

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It was attempted in the Civil Rights Cases to extend the application of the Fourteenth Amendment to cases where a person had been denied equal protection of the laws and had been deprived of his life, liberty or property by an individual unsupported in any way by State authority. That is to say, in the Civil Rights case it was claimed that the act of an innkeeper in refusing accomodations to colored men was the act of the State, prohibited by the Fourteenth Amendment of the Constitution of the United States. This Court declined to hold that an innkeeper refusing accommodation to a colored man was an agent of the State, and said at page 17 as follows:

> "In this connection it is proper to state that civil rights, such as are guaranteed by the Constitution against State aggression, cannot be impaired by the wrongful acts of individuals, unsupported by State authority in the shape of laws, customs, or judicial or executive proceedings. The wrongful act of an individual, unsupported by any such authority, is simply a private wrong, or a crime of that individual; an invasion of the rights of the injured party, it is true, whether they affect his person, his property,

or his reputation; but if not sanctioned in some way by the State, or not done under State authority, his rights remain in full force, and may presumably be vindicated by resort to the laws of the State for redress. * * * Hence, in all those cases where the Constitution seeks to protect the rights of the citizen against discriminative and unjust laws of the State by prohibiting such laws, it is not individual offences, but abrogation and denial of rights, which it denounces, and for which it clothes Congress with power to provide a remedy. This abrogation and denial of rights, for which the States alone were or could be responsible, was the great seminal and fundamental wrong which was intended to be remedied. And the remedy to be provided must necessarily be predicated upon that wrong. It must assume that in the cases provided for, *the evil or wrong actually committed rests upon some State law or State authority for its excuse and perpetration.*"

In the case of Yik Wo vs. Hopkins, 118 U. S., 356, it was held that a municipal corporation was the agent of the State and that any *administration* of a municipal ordinance which made an arbitrary and unjust discrimination founded on

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differences of race was a violation of the Fourteenth Amendment of the Constitution in that it denied the equal protection of the laws to the Chinese race.

At page 374, the Court said:

> "In the present cases we are not obliged to reason from the probable to the actual, and pass upon the validity of the ordinances complained of, as tried merely by the opportunities which their terms afford, of unequal and unjust discrimination in their administration. For the cases present the ordinances in actual operation, and the facts shown establish an administration directed so exclusively against a particular class of persons as to warrant and require the conclusion that, whatever may have been the intent of the ordinances as adopted, they are applied by the public authorities charged with their administration, and thus representing the State itself, with a mind so unequal and oppressive as to amount to a practical denial by the State of that equal protection of the laws which is secured to the petitioners, as to all other persons, by the broad and benign provisions of the Fourteenth Amendment to the Constitution of the United States. Though the law itself be fair on its face and

impartial in appearance, yet, if it is applied and administered by *public authority* with an evil eye and an unequal hand, so as practically to make unjust and illegal discriminations between persons in similar circumstances, material to their rights, the denial of equal justice is still within the prohibition of the Constitution. * * * *

"The discrimination is, therefore, illegal, and the public administration which enforces it is a denial of the equal protection of the laws and a violation of the Fourteenth Amendment of the Constitution. The imprisonment of the petitioners is, therefore, illegal, and they must be discharged."

In the case of Scott vs. McNeal, 154 U. S., 34, it was held that a decision of the highest Court of the State of Washington by which the purchaser at an administrator's sale under order of the Probate Court of land of a living person who had no notice of the proceeding, was the act of the State of Washington within the meaning of the Fourteenth Amendment of the Constitution of the United States, and deprived him of his property without due process of law, contrary to such amendment.

In Missouri Pacific Railway vs. Nebraska, 164

U. S., 403, it was held that the State Board of Transportation created by an act of the Legislature of Nebraska, was the agent of the State, and that the act of such Board requiring a railroad, which had permitted the erection of an elevator by a private person on its right of way, to grant the same right to other private persons upon like terms is to be deemed the act of the State of Nebraska and the taking of private property of the railroad for a private use in violation of the Fourteenth Amendment of the Constitution of the United States.

In Chicago, Burlington & Quincy Railroad Co. vs. Chicago, 166 U. S., 226, this doctrine was again approved in a case in which the question was whether the State Court had by its decision in a condemnation proceeding deprived a citizen of his property without due process of law. It was held that the decision of the Court was the act of the State of Illinois, and it was said at page 233, as follows:

> "But it must be observed that the prohibitions of the amendment refer to all the instrumentalities of the State, to its legislative, executive and judicial authorities, and therefore, whoever, *by virtue of public*

> *position* under a State Government deprives another of any right protected by that amendment against deprivation by the State, 'violates the constitutional inhibition; and as he acts in the name and for the State, and is clothed with State's power, his act is that of the State.' This must be so, or, as we have often said, the constitutional prohibition has no meaning, and 'the State has clothed one of its agents with power to annul or evade it.' "

Although guilty of a deviation of some thirty feet from the duly filed routes and general plan hereinbefore referred to, the Board of Rapid Transit has acted in the name of and for the State, and from purely public motives. It has been clothed with the State's power, and its acts, even though now held by the Court below to have been unauthorized, were in point of fact carried through solely by virtue of the authority conferred upon it by the State and because of the power derived from the Legislature.

In Reagan vs. Farmers' Loan and Trust Company, 154 U. S., 362, it appeared that the Legislature of the State of Texas passed an act to establish a railroad commission, giving the said commission the power and imposing upon

it the duty of establishing reasonable rates. What rates should be deemed reasonable was left to the discretion of the commission. The commission duly organized and proceeded to establish certain rates, whereupon the Farmers' Loan and Trust Company filed its bill in the Circuit Court of the United States for the Western District of Texas, averring that such rates were unreasonable and unjust and praying a decree restaining the commission from enforcing the same. Upon the appeal to this Court, two points were decided: *First*, that this suit could not be deemed a suit against a State within the meaning of the Eleventh Amendment to the Constitution. *Second*, that the rates as established by the commission were unreasonable and therefore within the prohibition of the Fourteenth Amendment against State action resulting in unjust discrimination and unequal protection of the laws. The enforcement of the particular rates in question was restrained, and at page 390 the Court expressed itself in the following terms:

> "Neither will the constitutionality of the statute, if that be conceded, avail to oust the Federal Court of jurisdiction. *A valid law may be wrongfully administered by officers of*

> *the State, and so as to make such administration an illegal burden and exaction upon the individual.* A tax law, as it leaves the legislative hands, may not be obnoxious to any challenge, and yet the officers charged with the administration of that valid tax law may so act under it in the matter of assessment or collection as to work an illegal trespass upon the property rights of the individual. They may go beyond the powers thereby conferred, and when they do so, the fact that they are assuming to act under a valid law will not oust the courts of jurisdiction to restrain their excessive and illegal acts."

What constitutes the act of a State with reference to the provisions of the Fourteenth Amendment to the Federal Constitution was fully discussed by Mr. Justice McKenna, while Circuit Judge, and by Judge Taft, when a member of the Circuit Court of Appeals.

In *Iron Mountain R. Co. vs. City of Memphis*, 96 Fed. Rep., 113, before the Circuit Court of Appeals for the Sixth Circuit, TAFT J., in delivering the opinion of the Court, after pointing out that the constitutional prohibition must refer to any agency of the State, continued as follows (p. 121):

"The first question presented is whether action by the legislative council of the City of Memphis under its general power of controlling the streets and of enforcing contracts with reference to their occupancy by individuals or corporations, is action by a state within the operation of this ammendment. There can be little doubt upon this point. * * *

"The principle was applied in *Ex parte* Virginia to the judge of a county court who had excluded jurors from a jury in a state court on account of race, color, and previous condition of servitude. It was followed and restated in Neal vs. Delaware, 103 U. S., 370–397, where the particular act under investigation was the act of the officers charged by the law with the selection of jurors. This was held to be State action, and in so far as the officers excluded from the jury men on account of their race it was held to be a violation of the Fourteenth Amendment."

The case of Pacific Gas Imp. Co. vs. Ellert, 64 Fed. Rep., 421, came before Mr. Justice McKENNA, then Circuit Judge, upon an order to show cause why an injunction should not be continued. The bill of complaint alleged that the Board of Supervisors of San Francisco, assuming to act under

an act of the Legislature approved March 18, 1885, known as the "Street Law" (Chapter 153 of Laws of 1885, as amended) had posted a resolution of intention to improve a pretended street designated as "Lewis Street," thereby threatening to destroy the property of the plaintiff. The bill further alleged that no kind of legal proceedings had ever been instituted for opening such a street or for condemning or acquiring any of the property rights of the plaintiff. The Street Law only authorized the Board to improve or repair streets already opened and in existence, but conferred no power to condemn or take property not already acquired. (See p. 429 of the opinion and California cases there cited; also the text of the statute). The case presented is therefore on all fours with the one under discussion. The learned Justice, after stating the facts, addressed himself to the question of jurisdiction as follows:

> "The questions involved are the right of the plaintiff as riparian proprietor; the character and legality of the acts of Board of Supervisors, as infringing that provision of the Fourteenth Amendment of the Constitution of the United States which prohibits a

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state from depriving a person of property without due process of law. * * * The defendants, however, urge that the fourteenth amendment is only directed against state action by the Legislature, *or if it is* prohibitive of executive acts, *only of authorized executive acts*, and that in the case at bar there is no act of the Legislature under which plaintiff's property is sought to be taken, and that if Lewis Street is not open or has not been dedicated, the Board of Supervisors is proceeding without authority, and its acts cannot be attributable to the state. Both contentions appear to be opposed to *Ex parte* Virginia, 100 U. S., 346" (pp. 429–30).

After quoting at length from the opinion of Judge STRONG, Judge MCKENNA then continued:

"In Virginia vs. Rives, 100 U. S., 313–338, the same learned Justice said (p. 318): 'The provisions of the Fourteenth Amendment of the Constitution we have quoted all have reference to State action exclusively, and not to any action of private individuals * * * It is doubtless true that a state may act through different agencies—either by its legislative, its executive, or its judicial authorities—and the prohibition of the

amendment extends to all action of the State denying equal protection of the laws, whether it be by action by one of these agencies or by another.' This language is made unmistakable by the dissenting opinion of Justices FIELD and CLIFFORD. There was a series of cases involving the rights of the colored race, all of which were based on the same reasoning by the Court and by those learned Justices. In Virginia vs. Rives and *ex parte* Virginia the action was by judicial officers unauthorized by a State statute. The instance under consideration was the omission to put colored citizens on the jury list. The State statute made no discrimination. Justices FIELD and CLIFFORD therefore contended, among other things—but unavailingly contended—that the action of the officers was not the action of the State. * * * This Court, therefore, has jurisdiction, and it will be necessary to consider the other issues" (pages 430–1).

It is clear that the Board of Rapid Transit in this case built the subway in Park Avenue and took whatever action it did in that regard by virtue of its public position and of the powers and rights derived from the Rapid Transit Act.

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It is equally clear that such Board appointed by the Act of the Legislature is an agent of the State of New York, within the meaning of the Fourteenth Amendment of the Constitution, just as certainly as was the Texas Railroad Commission an agent of the State of Texas (Reagan vs. Farmers' Loan and Trust Company, *supra*), and the Nebraska State Board of Transportation an agent of the State of Nebraska (Missouri Pacific Railway vs. Nebraska, 164 U. S., 403).

We, therefore, respectfully submit that under the case of *Ex parte* Virginia (*supra*) and the other decisions of this Court above referred to, any act done by said Board of Rapid Transit in its public capacity, is the act of the State within the meaning of the Fourteenth Amendment of the Constitution as construed by this Court, even though such act may not have been in exact accordance with the specific powers given it by the Legislature, and that the tunnel as built in Park Avenue by the Board of Rapid Transit must be deemed to have been so built by the State of New York.

SECOND POINT.

The judgment of the United States Circuit Court for the Southern District of New York should be reversed.

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